2410.

SUPREME COURT OF THE UNITED STATES.

No. 137.

REUBEN CHAPMAN, GOVERNOR, &c., FOR THE USE OF JOHN W. AND RUFUS LEAVITT, PLAINTIFF IN ERROR,

VS.

ALEXANDER SMITH, BOLLING HALL, MALCOM SMITH, AND JOHN C. GRAHAM.

IN ERROR TO THE DISTRICT COURT, UNITED STATES, FOR THE MIDDDE DISTRICT OF ALABAMA.

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UNITED STATES OF AMERICA,
Middle district of Alabama.

At a district court of the United States, for the middle district of Alabama, begun and held at Montgomery, on the first Monday after the fourth Monday of November, in the year of our Lord one thousand eight hundred and fifty-one.

The honorable John Gayle, judge of said court, not being present, the marshal adjourned court until to-morrow morning, 10 o'clock.

TUESDAY MORNING, *Dec'r 2d*, 1851.

The court met pursuant to adjournment. Present, the honorable John Gayle, judge of said court.

Writ of error.

UNITED STATES OF AMERICA, *ss.*

The President of the United States, to the honorable the judge of the district court of the United States, for the middle district of Alabama, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you, between Reuben Chapman, governor, &c., for the use of John B. Leavitt and Rufus Leavitt, plaintiffs, and Alexander Smith, Bolling Hall, Malcom Smith, and John G. Graham, defendants, a manifest error hath happened, to the great damage of the said Reuben Chapman, governor, &c., for the use of John W. Leavitt and Rufus Leavitt, as by his complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the honorable Roger B. Taney, chief justice of the said Supreme Court, this sixth day of December, in the year of Lord one thousand eight hundred and fifty-one.

Issued 6th day of December, A. D. 1851.

Attest: MATT. GAYLE,
Clerk of said court.

Citation.

United States of America, to Alexander Smith, Bolling Hall, Malcom Smith, and John G. Graham.

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the district court of the United States, for the middle district of Alabama, wherein Reuben Chapman, for the use of John W. Leavitt and Rufus Leavitt, are plaintiffs, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable John Gayle, judge of said district court, this sixth day of December, in the year 1851.

JOHN GAYLE, *Judge.*

Affidavit of marshal.

Before me, M. Gayle, clerk of the above mentioned district court, personally appeared H. Wilkins, deputy marshal, who being duly sworn deposes and says, that on the sixth day of December, in the year eighteen hundred and fifty-one, he served a true copy of the above citation on E. W. Peck, esq.

H. WILKINS, *D. M.*

Sworn to and subscribed before me, this 10th day of December, 1851.

MATT. GAYLE,
Clerk of said court.

Marshal's return.

Received 6th day of December, 1851, and executed same day.

C. BINGHAM, *U. S. M.*,
By H. WILKINS, *D. M.*

Writ.

UNITED STATES OF AMERICA,
District court of the United States,
for the middle district of Alabama.

The President of the United States, to the marshal of said district, greeting:

You are hereby commanded to take the bodies of Alexander Smith, John G. Graham, Bolling Hall, and Malcom Smith, who are citizens of the State of Alabama, and them safely keep, so that you have their bodies before the honorable the judge of the said court at the place of holding said court at Montgomery, on the first Monday after the fourth

Monday of November next, to answer to Reuben Chapman, governor of the State of Alabama, who sues for the use of John W. Leavitt and Rufus Leavitt, partners by the name and style of J. W. & R. Leavitt, who are citizens of the State of New York, in a plea that they render unto said plaintiff the sum of thirty thousand dollars, which they owe to him and from him unjustly detain, to the plaintiff's damage sixty thousand dollars.

Herein fail not, and have you then and there this writ.

Witness the honorable William Crawford, judge of the said court, this fourth Monday in May, in the year of our Lord one thousand eight hundred and forty-eight.

Issued the 28th day of October, in the year of our Lord one thousand eight hundred and forty-eight.

Attest: A. G. GOOCH,
Clerk, D. C., middle district of Alabama.

Security for the costs.

I acknowledge myself security for costs at the instance of the plaintiff in the above suit.

J. W. PRYOR.

Endorsement.

This action is brought on a bond executed on the 16th day of October, 1839, by the said Alexander Smith, as sheriff of Coosa county, in said State, with the other defendants as his sureties, together with John H. Thomas and Addison C. Love, who are not sued in this action. The said J. W. & R. Leavitt caused an execution to be issued from the circuit court of said county against the property of J. M. Frion on or about the day of 1839, for $3,472 00, and placed the same in the hands of the said Alexander Smith; which said execution said Smith failed to make the money on, and this failure will be assigned as a breach of the said bond. The plaintiff will also assign as breaches: 1. The neglect of the sheriff to sell goods levied on under said execution. 2. The neglect to take any claim bond when goods levied on under said execution were claimed by Dawson and S. Frion. 3. The neglect to take a good claim bond when the goods levied on under said execution were claimed by Dawson and Frion. 4. The neglect to inform said Leavitts of the existence of said claim bond, or to return the same to the clerk's office. 5. Not levying said execution on the property of said Frion. And other breaches will also be assigned when declaration shall be filed.

PRYOR & WHATLEY.

Marshal's return.

Received 1st November, 1848. Executed on Graham November 1st, and on Hall and Smith on 6th November, 1848, and on Malcom Smith the 20th instant, November.

J. G. LYON, *U. S. Marshal,*
Per H. WILKINS, *D. M.*

Declaration.

UNITED STATES OF AMERICA, *ss.*

District court of the United States, for the middle district of Alabama, December term, A. D. 1848.

Reuben Chapman, governor of the State of Alabama, who sues for the use of John W. Leavitt and Rufus Leavitt, partners by the name and style of J. W. and R. Leavitt, who are citizens of the State of New York, by attorney, complains of Alexander Smith, John G. Graham, Bolling Hall, and Malcom Smith, in custody, &c., who are citizens of the State of Alabama, in a plea that they render unto said plaintiff the sum of thirty thousand dollars, which they owe to him, and from him unjustly detain.

Bond.

For that whereas the said defendants, together with one John H. Thomas and one Addison C. Love, who are not sued in this action, heretofore, to wit, on the 16th day of October, in the year of our Lord one thousand eight hundred and thirty-nine, at Coosa county, to wit, in the district aforesaid, by their certain writing obligatory, sealed with their seals, and now here shown to the court, the date whereof is a certain day and year therein mentioned, to wit, the day and year aforesaid, acknowledged themselves to be held and firmly bound unto A. P. Bagby, governor of the State of Alabama, and his successors in office, in the penal sum of thirty thousand dollars, above demanded to be paid to the said A. P. Bagby, and his successors in office, by the said defendants; which writing obligatory was and is subject to a certain condition thereunder written, where-

Condition of bond.

by reciting to the effect following, to wit, that the said Alexander Smith had been appointed by the governor of said State of Alabama sheriff of said county of Coosa, in said State of Alabama, to act until the twenty-second day of February then next thereafter, to wit, the twenty-second day of February, in the year of our Lord one thousand eight hundred and forty, to fill the vacancy occasioned by the death of James E. M. Logan, then late sheriff of said county of Coosa; it was conditioned, that if the said Alexander Smith should well and truly perform all and singular the duties required of him by the laws of said State of Alabama as sheriff, and pay over all moneys by him collected by virtue of his office of sheriff, as was or might be required of him by law, then that said obligation should be void, else to remain in full force and virtue, as by the said writing obligatory, and the said condition thereof, will more fully appear.

Recovery of judgment.

And the said plaintiff in fact saith, that the said John W. Leavitt and Rufus Leavitt, partners as aforesaid, by the name and style of

J. W. and R. Leavitt, heretofore, to wit, at the fall term, in the year of our Lord one thousand eight hundred and thirty-nine, of the circuit court of the second circuit, for said State of Alabama, held for said county of Coosa, by the consideration and judgment of said court, recovered against one Jeremiah M. Frion the sum of three thousand four hundred and seventy-two dollars for their damages by reason of the non-performance of certain promises and undertakings and also their costs and charges in and about that behalf expended, whereof the said Jeremiah M. Frion was convicted, as by the record and proceedings thereof remaining in the said circuit court for the county of Coosa aforesaid fully appears; which said judgment remains in full force, not reversed, annulled, set aside, or satisfied.

Issuance of execution.

And the said plaintiff further saith, that the said damages and costs, or any part thereof, not being paid or satisfied, and the said judgment being in full force, the said J. W. and R. Leavitt, for the obtaining satisfaction thereof heretofore, to wit, on the seventeenth day of October, in the year of our Lord one thousand eight hundred and thirty-nine, sued out of the said circuit court for the county of Coosa aforesaid a certain writ of the State of Alabama, called a fieri facias, upon the said judgment, directed to any sheriff of the State of Alabama; by which said writ any sheriff of the State of Alabama was commanded, that of the goods and chattels, lands and tenements, of one Jeremiah M. Frion, he should cause to be made the sum of three thousand four hundred and seventy-two dollars, their damages aforesaid, and also the sum of seven dollars and twenty-five cents, their costs aforesaid, in and about that behalf expended, whereof the said Jeremiah M. Frion was convicted as aforesaid, and so recovered against him, the said Jeremiah M. Frion, as aforesaid; and that he have the said moneys at the then next circuit court to be holden for said county of Coosa on the fourth Monday in March then next thereafter, to render to the said J. W. and R. Leavitt, for their damages and costs aforesaid, and that said sheriff should have said writ there; which said writ afterwards, and before the return day thereof, to wit, on the twenty-first day of October, in the year of our Lord one thousand eight hundred and thirty-nine, in the county of Coosa aforesaid, was delivered to the said Alexander Smith, who then and from thence, until, at, and after the day of the return of the said writ, was sheriff of the said county of Coosa, to be executed in due form of law; and although there were, then and afterwards, and before the return of the last mentioned writ, and during the whole time the said last mentioned writ was in the hands of the said Alexander, divers goods and chattels, lands and tenements, of the said Jeremiah M. Frion, within the said county of Coosa, whereof the said Alexander could and might, and ought to have levied the moneys directed to be levied and made as aforesaid, whereof the said Alexander so being sheriff as aforesaid, during all the time aforesaid, then had notice. Yet

the said Alexander, being sheriff as aforesaid, not regarding the duty of his office as such sheriff, did not nor would, at any time before the return of the last mentioned writ, levy the moneys last aforesaid, or any part thereof, but wholly neglected and refused so to do, and therein failed and made default, and returned said writ to the office of said clerk, without having made any part of the said moneys commanded to be made by said last mentioned writ. By means of which said several last mentioned premises, the said plaintiff has been and is greatly injured and deprived of the means of obtaining the said moneys so commanded to be made by said writ, which are still wholly unpaid as aforesaid. And the said plaintiff, for assigning a further breach of the said writing obligatory, according to the statute in such case made and provided, further says, the said Alexander, so being sheriff of said county of Coosa as aforesaid, afterwards and before the return of the said last mentioned writ, to wit, on the first day of February, in the year of our Lord one thousand eight hundred and forty, at, to wit, the said county of Coosa, as such sheriff as aforesaid, seized and took in execution divers goods and chattels of the said Jeremiah M. Frion, of great value, to wit, of the value of the moneys mentioned and commanded to be made by the writ last aforesaid, and commanded to be levied as aforesaid; and the plaintiff in fact saith, that although the said Alexander, so being such sheriff as aforesaid, could and might, and ought to have advertised and sold the said goods and chattels under and by virtue of said last mentioned writ, and have thereby levied the said sums of money mentioned in said last mentioned writ, yet the said Alexander, so being such sheriff as aforesaid, not regarding his said office of sheriff, did not at any time, either before or after the return of said last mentioned writ, sell or dispose of the said goods and chattels so by him seized and taken under and by virtue of said last mentioned writ, and thereby levy the said damages and costs so recovered by the said J. W. and R. Leavitt as aforesaid; by means of which said last mentioned premises, the said J. W. and R. Leavitt have been and are greatly injured, and have been prevented from obtaining the said damages and costs so recovered by them as aforesaid, and which are still wholly unpaid as aforesaid.

And the said plaintiff, for assigning a further breach of the said writing obligatory, according to the statute in such case made and provided, further says, the said Alexander, so being sheriff as aforesaid, afterwards, and before the return of said last mentioned writ, to wit, on the first day of February, in the year of our Lord one thousand eight hundred and forty, at, to wit, the said county of Coosa aforesaid, as such sheriff as aforesaid, seized and took in execution divers goods and chattels of the said Jeremiah M. Frion, of great value, to wit, of the value of the moneys mentioned in said last mentioned writ, and commanded to be levied as aforesaid. And the plaintiff in fact saith, that although the said Alexander, so being such sheriff as aforesaid, could and might, and ought to have advertised and sold the said goods and chattels under, and by virtue of, said last mentioned writ, and have

thereby levied the sums specified in said last mentioned writ, yet the said Alexander, so being such sheriff as aforesaid, not regarding his said office of sheriff, did not at any time, either before or after the return of said writ, sell or dispose of the said goods and chattels so by him seized and taken under, and by virtue of, said last mentioned writ, and thereby levy the said damages and costs so recovered by the said J. W. & R. Leavitt as aforesaid.

And the said plaintiff in fact further saith, that, at the return of said writ, the said Alexander, so being such sheriff as aforesaid, returned to the said court aforesaid, on said writ, that he had levied said writ on a stock of goods consisting of dry goods, hardware, carriages, &c., as the property of said Jeremiah M. Frion, on the first day of February, in the year of our Lord one thousand eight hundred and forty; by means of which said several last mentioned premises the said J. W. & R. Leavitt have been and are greatly injured, and have been prevented from obtaining the said damages and costs so recovered by them as aforesaid, and which are still wholly unpaid as aforesaid.

And the said plaintiff, for assigning a further breach of the said writing obligatory, according to the statute in such case made and provided, further says, the said Alexander, so being sheriff as aforesaid, afterwards, and before the return of the said last mentioned writ, to wit, on the first day of February, in the year of our Lord one thousand eight hundred and forty, seized and took in execution divers goods and chattels of the said Jeremiah M. Frion, of great value, to wit, of the value of the moneys mentioned in said last mentioned writ, and commanded to be made as aforesaid.

And the plaintiff in fact saith, that, although the said Alexander, so being such sheriff as aforesaid, could and might, and ought to have advertised and sold the said goods and chattels under, and by virtue of, said last mentioned writ, and have thereby levied the sums specified in said last mentioned writ, yet the said Alexander, so being such sheriff as aforesaid, not regarding his said office of sheriff, did not at any time, either before or after the return of said writ, sell or dispose of the said goods and chattels so by him seized and taken under, and by virtue of, said last mentioned writ, and thereby levy the said damages and costs so recovered by the said J. W. & R. Leavitt as aforesaid.

And the said plaintiff in fact further saith, that, at the return of said writ, the said Alexander, so being such sheriff as aforesaid, returned to the said court aforesaid, on said writ, that he had levied said writ on a stock of goods, consisting of dry goods, hardware, carriages, &c., as the property of said Jeremiah M. Frion, on the first day of February, in the year of our Lord one thousand eight hundred and forty.

And the said plaintiff further saith, that, after the return of said last mentioned writ, to wit, on the twelfth day of September, in the year of our Lord one thousand eight hundred and forty, the said Alexander, by leave of the said circuit court first had and obtained, altered or amended his said return on said writ, by adding thereto the following words and figures, to wit: "The above goods have been claimed by A.

B. Dawson and Samuel Frion, assignees of J. M. Frion, defendant, in execution and claim bond given to William J. Campbell, now sheriff, and my successor in office. September 12th, 1840. A. Smith, late sheriff."

And the said plaintiff in fact saith, the said amended return is false, and that no claim, in pursuance of the statute in such case made and provided, ever was made by the said Dawson and Samuel Frion to the said goods and chattels at any time before the return day of said writ; by means of which said several last mentioned premises the said J. W. & R. Leavitt have been and are greatly injured, and have been prevented from obtaining the said damages and costs so recovered by them as aforesaid, and which are still wholly unpaid as aforesaid.

And the said plaintiff, for assigning a further breach of the said writing obligatory, according to the statute in such case made and provided, further says, the said Alexander, so being such sheriff as aforesaid, afterwards, and before the return of the said last mentioned writ, to wit, on the first day of February, in the year of our Lord one thousand eight hundred and forty, at, to wit, the said county of Coosa, as such sheriff as aforesaid, seized and took in execution divers goods and chattels of the said Jeremiah M. Frion, of great value, to wit, of the value of the moneys mentioned in said last mentioned writ, and commanded to be levied as aforesaid.

And the plaintiff in fact saith, that, although the said Alexander, so being such sheriff as aforesaid, could and might, and ought to have advertised and sold the said goods and chattels under, and by virtue of, said last mentioned writ, and have thereby levied the sums specified in said last mentioned writ, yet the said Alexander, so being such sheriff as aforesaid, not regarding his said office of sheriff, did not at any time, either before or after the return of said writ, sell or dispose of the said goods and chattels so by him seized and taken under, and by virtue of, said last mentioned writ, and thereby levy the said damages and costs so recovered by the said J. W. & R. Leavitt as aforesaid.

And the said plaintiff in fact further saith, that at the return of said writ the said Alexander, so being such sheriff as aforesaid, returned to the said court aforesaid, on said writ, that he had levied said writ on a stock of goods consisting of dry goods, hardware, carriages, &c., as the property of said Jeremiah M. Frion, on the first day of February, in the year of our Lord one thousand eight hundred and forty. And the said plaintiff further saith, that after the return of said last mentioned writ, to wit, on the twelfth day of September, in the year of our Lord one thousand eight hundred and forty, the said Alexander, by leave of the said circuit court first had and obtained, altered or amended his said return on said writ by adding thereto the following words and figures, to wit:

"The above goods have been claimed by A. B. Dawson and Sam'l Frion, assignees of J. M. Frion, defendant in execution, and claim bond given to Wm. J. Campbell, now sheriff, and my successor in office, September 12, 1840. "A. SMITH, *late Sheriff*."

And the said plaintiff in fact saith, the said amended return is false, and that no claim in pursuance of the statute in such cases made and provided ever was made by the said Dawson and Samuel Frion to the said goods and chattels at any time before the return day of said writ.

And the said plaintiff in fact saith, that at no time whilst the said writ was in the hands of the said Alexander, nor at any time before the return day thereof, did the said Dawson and Samuel Frion, or either of them, or any person for them, claim, in pursuance of the statute in such case made and provided, said goods and chattels levied upon as aforesaid, by making affidavit that said goods and chattels belonged to said Dawson and Samuel Frion, or were claimed by them; by means of which said several last mentioned premises the said J. W. & R. Leavitt have been and are greatly injured, and have been prevented from obtaining the said damages and costs so recovered by them, and which are still wholly unpaid as aforesaid. And the said plaintiff, for assigning a further breach of the said writing obligatory, according to the statute in such case made and provided, further says, the said Alexander, so being such sheriff as aforesaid, afterwards, and before the return of the said last mentioned writ, to wit, on the first day of February, in the year of our Lord one thousand eight hundred and forty, at, to wit, the said county, as such sheriff as aforesaid, seized and took in execution divers goods and chattels of the said Jeremiah M. Frion, of great value, to wit, of the value of the moneys mentioned in said last mentioned writ, and commanded to be levied as aforesaid. And the plaintiff in fact saith, that although the said Alexander, so being such sheriff as aforesaid, could, and might, and ought, to have advertised and sold the said goods and chattels under and by virtue of said last mentioned writ, and have thereby levied the sums specified in said last mentioned writ, yet the said Alexander, so being such sheriff as aforesaid, not regarding his said office of sheriff, did not at any time, either before or after the return of said writ, sell or dispose of the said goods and chattels so by him seized and taken under and by virtue of said last mentioned writ, and thereby levy the said damages and costs so recovered by the said J. W. & R. Leavitt as aforesaid. And the said plaintiff in fact further saith, that at the return of said writ, the said Alexander, so being such sheriff as aforesaid, returned to the said court aforesaid, on said writ, that he had levied said writ on a stock of goods consisting of dry goods, hardware, carriages, &c., as the property of said Jeremiah M. Frion, on the first day of February, in the year of our Lord one thousand eight hundred and forty.

And said plaintiff further saith, that after the return of said last mentioned writ, to wit, on the twelfth day of September, in the year of our Lord one thousand eight hundred and forty, the said Alexander, by leave of the said circuit court first had and obtained, altered or amended his return on said writ by adding thereto the following words and figures, to wit, "the above goods have been claimed by A. B. Dawson and Samuel Frion, assignees of Jeremiah M. Frion, defendant, in execu-

tion, and claim bond given to William J. Campbell, now sheriff, and my successor in office, September 12th, 1840.

A. SMITH, *late Sheriff.*"

And the said plaintiff in fact saith, the said amended return is false, and that no claim, in pursuance of the statute in such case made and provived, ever was made by the said Dawson and Samuel Frion to the said goods and chattels at any time before the return day of said writ; and the said plaintiff in fact saith, that at no time whilst the said writ was in the hands of the said Alexander, nor at any time before the return day thereof, did the said Dawson and Samuel Frion, or either of them, or any person for them, make or execute, in pursuance of the statute in such case made and provided, a bond in a penalty in double the amount of said damages and costs, payable to said J. W. and R. Leavitt, and conditioned for the forthcoming of the said goods and chattels, levied upon as aforesaid, if the same should be found liable to said writ of execution, and for the payment of such costs and damages as should be recovered for putting in the claim for delay; by means of which said several last mentioned premises the said J. W. & R. Leavitt have been and are greatly injured, and have been prevented from obtaining the said damages and costs so recovered by them, and which are still wholly unpaid as aforesaid.

And the said plaintiff, for assigning a further breach of the said writing obligatory, according to the statute in such case made and provided, further says, the said Alexander so being such sheriff as aforesaid afterwards, and before the return of said last mentioned writ, to wit, on the first day of February, in the year of our Lord one thousand eight hundred and forty, at, to wit, the said county, as such sheriff as aforesaid, seized and took in execution divers goods and chattels of the said Jeremiah M. Frion, of great value, to wit, of the value of the moneys mentioned in said last mentioned writ, and commanded to be levied as aforesaid; and the plaintiff in fact saith, that although the said Alexander, so being such sheriff as aforesaid, could and might, and ought to have advertised and sold the said goods and chattels, under and by virtue of said last mentioned writ, and have thereby levied the sums specified in said last mentioned writ, yet the said Alexander, so being such sheriff as aforesaid, not regarding his said office as sheriff, did not at any time, either before or after the return of said writ, sell or dispose of the goods and chattels so by him seized and taken under and by virtue of said last mentioned writ, and thereby levy the said damages and costs so recovered by the said J. W. & R. Leavitt as aforesaid; and the said plaintiff in fact further saith, that at the return of said writ the said Alexander, so being such sheriff as aforesaid, returned to the said court aforesaid on said writ that he had levied said writ on a stock of dry goods, hardware, carriages, &c., as the property of said Jeremiah M. Frion, on the first day of February, in the year of our Lord one thousand eight hundred and forty; and said plaintiff further saith, that after the return of said last mentioned writ, to wit, on the

twelfth day of September, in the year of our Lord one thousand eight hundred and forty, the said Alexander, by leave of the said circuit court first had and obtained, altered or amended his said return on said writ by adding thereto the following words and figures, to wit: "The above goods have been claimed by A. B. Dawson and Samuel Frion, assignees of J. M. Frion, defendant, in execution, and claim bond given to William J. Campbell, now sheriff, and my successor in office, September 12th, 1840.

A. SMITH, *late Sheriff*."

And the said plaintiff in fact saith, the said amended return is false, and that no claim, in pursuance of the statute in such case made and provided, ever was made by the said Dawson and Samuel Frion to the said goods and chattels at any time before the return day of said writ. And the said plaintiff in fact saith, that at no time whilst the said writ was in the hands of the said Alexander, nor at any time before the return day thereof, did the said Dawson and Samuel Frion, or either of them, or any person for them, claim, in pursuance of the statute in such case made and provided, said goods and chattels so seized and taken in execution as aforesaid, by making affidavit that said goods and chattels belonged to said Dawson and Samuel Frion, or were claimed by them. And the said plaintiff in fact saith, that at no time whilst the said writ was in the hands of said Alexander, nor at any time before the return day thereof, did the said Dawson and Samuel Frion, or either of them, or any person for them, make or execute, in pursuance of the statute in such case made and provided, a bond in a penalty of double the amount of said damages and costs, payable to said J. W. and R. Leavitt, and conditioned for the forthcoming of the said goods and chattels levied upon as aforesaid, if the same should be found liable to said writ of execution, and for the payment of such costs and damages as should be recovered for putting in the claim for delay. By means of which said several last mentioned premises the said J. W. and R. Leavitt have been and are greatly injured, and have been prevented from obtaining the said damages and costs so recovered by them, and which are still wholly unpaid.

8. And the plaintiff, for assigning a further breach of the said writing obligatory, according to the statute in such case made and provided, further saith, that the said Alexander, so being sheriff as aforesaid, afterwards, and before the return of said last mentioned writ, to wit, on the first day of February, in the year of our Lord one thousand eight hundred and forty, at, to wit, the county aforesaid, as such sheriff as aforesaid, seized and took in execution divers goods and chattels of the said Jeremiah M. Frion, of great value, to wit, of the value of the moneys mentioned in said writ, and commanded to be levied as aforesaid. And the plaintiff further says that, after the said levy, and before the return of said writ, one Armistead B. Dawson made affidavit before a justice of the peace in and for said county, in pursuance of the statute in such case made and provided, that the said goods and chattels, so seized and taken in execution as aforesaid, belonged to and were the

property of said Dawson and one Samuel Frion, and that they were not the property of said Jeremiah M. Frion. And the said plaintiff further says, that at the return of said writ the said Alexander, so being such sheriff as aforesaid, returned to the said court aforesaid on said writ that he had levied said writ on a stock of goods, consisting of dry goods, hardware, carriages, &c., 1st February, A. D. 1840, as the property of J. M. Frion. And the said plaintiff in fact saith, that although it was the duty of said Alexander, as such sheriff as aforesaid, after the making of the said affidavit by said Dawson, in pursuance of the statute in such case made and provided, to prepare a bond, payable to the said J. W. and R. Leavitt, in a penalty double the amount of the said damages and costs, to be executed by the said Dawson and Samuel Frion, or one of them, or by some person for them, with security, conditioned for the forthcoming of said goods and chattels so seized and taken in execution as aforesaid, if the same should be found liable to said writ of execution, and for the payment of such costs and damages as should be recovered for putting in the claim for delay; nevertheless, the said Alexander, so being such sheriff as aforesaid, not regarding his duty in that behalf, but contriving, and wrongfully and unjustly intending, to injure the said J. W. and R. Leavitt, and to deprive them of the benefit of said levy, and of the means of obtaining satisfaction of said damages and costs specified in said writ as aforesaid, did not, nor did nor would any other person whatsoever, for said Alexander, or on account of any other person, prepare and take from, or take from the said Dawson and Samuel Frion, or any person for them, or either of them, a bond, with security and conditioned as aforesaid. And the said plaintiff in fact saith, that he has not as yet obtained a return of said goods and chattels, so levied upon as aforesaid, or any part of them, and the said damages and costs have not, nor have any part thereof as yet, been paid to said J. W. and R. Leavitt; nor hath the said Jeremiah M. Frion, the said Alexander, the said A. B. Dawson, nor Samuel Frion, nor any other person whatsoever hitherto, answered to said J. W. and R. Leavitt for the value of said goods and chattels so levied on as aforesaid, or any part thereof; and by reason of the premises, the said J. W. and R. Leavitt have been and are wholly deprived of the said goods and chattels so levied upon as aforesaid, and of the benefit of said levy, and of the means of satisfying said damages and costs, or any part thereof. By means of which said several last mentioned premises the said J. W. and R. Leavitt have been, and are, greatly injured and deprived of the means of obtaining the said moneys so commanded to be made by said writ, which are still wholly unpaid as aforesaid. And the said plaintiff, for assigning a further breach of the said writing obligatory, according to the statute in such case made and provided, further saith, that the said Alexander, so being sheriff as aforesaid, afterwards, and before the return of said last mentioned writ, to wit, on the first day of February, in the year of our Lord one thousand eight hundred and forty, at, to wit, the county aforesaid, as such sheriff as aforesaid, seized and took in execution divers goods and

chattels of the said Jeremiah M. Frion, of great value, to wit, of the value of the moneys mentioned in said writ, and commanded to be levied as aforesaid.

And the plaintiff further says, that after the said levy, and before the return of said writ, one Armstead B. Dawson made affidavit before a justice of the peace, in and for said county, in pursuance of the statute in such case made and provided, that the said goods and chattels, levied upon as aforesaid, belonged to and were the property of said Dawson and one Samuel Frion, and that they were not the property of said Jeremiah M. Frion. And the said plaintiff further says, that at the return of said writ, the said Alexander, so being such sheriff as aforesaid, returned to the said court aforesaid, on said writ, that he had levied said writ on a stock of goods, consisting of dry goods, hardware, carriages, &c., 1st February, A. D. 1840, as the property of J. M. Frion. And the said plaintiff in fact saith, that although it was the duty of said Alexander, as such sheriff as aforesaid, after the making of the said affidavit by said Dawson, in pursuance of the statute in such case made and provided, to prepare a bond, payable to the said J. W. and R. Leavitt, in a penalty double the amount of the said damages and costs, to be executed by said Dawson and Samuel Frion, or one of them, or by some person for them with security, conditioned for the forthcoming of the said goods and chattels levied upon as aforesaid, if the same should be found liable to said writ of execution, and for the payment of such costs and damages as should be recovered for putting in the claim for delay; nevertheless the said Alexander, so being such sheriff as aforesaid, not regarding his duty in that behalf, but contriving, and wrongfully and unjustly intending, to injure the said J. W. and R. Leavitt, and to deprivet hem of the benefit of said levy, and of the means of obtaining satisfaction of said damages and costs specified in said writ as aforesaid, did not, nor would, nor did nor would any other person whatsoever, for said Alexander, or on account of any other person, prepare and take from, or take from the said Dawson and Samuel Frion, or any person for them or either of them, a bond, with security as aforesaid, and payable to the said J. W. and R. Leavitt, and conditioned as aforesaid. And the plaintiff in fact saith, that after said oath was made, and before the return of said writ, the said Alexander, as such sheriff as aforesaid, delivered and surrendered the said goods and chattels, so levied upon as aforesaid, to the said Dawson and Samuel Frion, without requiring and taking from said Dawson and Samuel Frion a bond payable to said J. W. and R. Leavitt, in a penalty and conditioned as aforesaid. And the said plaintiff in fact saith, that neither the said Dawson and Samuel Frion, nor any other person, has ever delivered the said goods and chattels to said J. W. and R. Leavitt, or to any person for them, nor have the said J. W. and R. Leavitt obtained a return of said goods and chattels so levied upon as aforesaid, or any part of them, but the said Dawson and Samuel Frion have consumed and wasted the said goods and chattels levied upon as aforesaid, and the said damages and cost have not, nor any part thereof, as yet been paid to said J. W. and R. Leavitt; nor hath the said Jeremiah M. Frion, the

said Alexander, the said Armstead B. Dawson, the said Samuel Frion, nor any other person, hitherto answered to said J. W. and R. Leavitt for the value of said goods and chattels so levied upon as aforesaid, or any part thereof; and by reason of the premises the said J. W. and R. Leavitt have been, and are, wholly deprived of the said goods and chattels so levied upon as aforesaid, and of the benefit of said levy, and of the means of satisfying said damages and costs. By means of which said several last mentioned premises the said J. W. and R. Leavitt have been, and are, greatly injured, and have been prevented from obtaining the said damages and costs so recovered by them, and which are still wholly unpaid as aforesaid.

10. And the said plaintiff, for assigning a further breach of said writing obligatory, according to the statute in such case made and provided, further says, that the said Alexander, so being sheriff as aforesaid, afterwards, and before the return of said last mentioned writ, on the first day of February, in the year of our Lord one thousand eight hundred and forty, at, to wit, the county aforesaid, as such sheriff as aforesaid, seized and took in execution divers goods and chattels of the said Jeremiah M. Frion, of great value, to wit, of the value of the moneys mentioned in said writ, and commanded to be levied as aforesaid. And the plaintiff further says, that after the said levy, and before the return of said writ, one Armstead B. Dawson made affidavit before a justice of the peace in and for said county, in pursuance of the statute in such case made and provided, that the said goods and chattels levied upon as aforesaid belonged to and were the property of said Dawson and one Samuel Frion, and that they were not the property of said Jeremiah M. Frion; and the said plaintiff further says, that at the return of said writ the said Alexander, so being such sheriff as aforesaid, returned to the said court aforesaid, on said writ, that he had levied said writ on a stock of goods consisting of dry goods, hardware, carriages, &c., 1st February, A. D. 1840, as the property of J. M. Frion. And the said plaintiff in fact saith, that although it was the duty of said Alexander, as such sheriff as aforesaid, after the making of the said affidavit by the said Dawson, in pursuance of the statute in such case made and provided, to prepare a bond, payable to the said J. W. and R. Leavit, in a penalty double the amount of the said damages and costs, to be executed by said Dawson and Samuel Frion, or one of them, or by some person for them, with security, conditioned for the forthcoming of said goods and chattels levied upon as aforesaid, if the same should be found liable to said writ of execution, and for the payment of such costs and damages as should be recovered for putting in the claim for delay. Nevertheless, the said Alexander, so being such sheriff as aforesaid, not regarding his duty in that behalf, but contriving, and wrongfully and unjustly intending, to injure the said J. W. and R. Leavitt, and to deprive them of the benefit of said levy, and of the means of obtaining satisfaction of said damages and costs specified in said writ as aforesaid, did not, nor would, nor did or would any other person whatsoever for said Alexander, or on account of any other person, prepare and take from, or take from the said Dawson and Samuel Frion, or any person for them, or either of them, a bond, with security as aforesaid, and payable to said J. W. and R.

Leavitt, and conditioned as aforesaid. And the plaintiff further says, that after said oath was made by the said Dawson as aforesaid, the said Alexander, as such sheriff as aforesaid, delivered and surrendered the goods and chattels, so levied upon as aforesaid, to the said Dawson and Samuel Frion, without requiring and taking from them a bond payable to the said J. W. and R. Leavitt, in a penalty and conditioned as aforesaid; and the plaintiff in fact saith, that neither said Dawson, Samuel Frion, nor any other person, has ever delivered the said goods and chattels to the said J. W. and R. Leavitt, or to any person for them, nor have the said J. W. and R. Leavitt obtained a return of said goods and chattels, levied upon as aforesaid, or any part of them, but the said Dawson and Samuel Frion used, consumed, and wasted said goods and chattels. And the said plaintiff further says, that the said damages and costs have not, nor have any part thereof, as yet been paid to said J. W. and R. Leavitt; nor hath the said Jeremiah M. Frion, the said Alexander, the said Dawson, the said Samuel Frion, nor any other person, hitherto answered to said J. W. and R. Leavitt for the value of said goods and chattels, so levied upon as aforesaid, or any part thereof. And, by reason of the premises, the said J. W. and R. Leavitt have been, and are, wholly deprived of the said goods and chattels, so levied upon as aforesaid, and of the benefit of said levy, and of the means of satisfying said damages and costs, which are wholly unpaid as aforesaid.

11. And the plaintiff, for assigning a further breach of said writing obligatory, according to the statute in such case made and provided, further says, that the said Alexander, so being sheriff as aforesaid, afterwards, and before the return of said last mentioned writ, to wit, on the first day of February, in the year of our Lord one thousand eight hundred and forty, at, to wit, the county aforesaid, as such sheriff as aforesaid, seized and took in execution divers goods and chattels of the said Jeremiah M. Frion, of great value, to wit, of the value of the moneys mentioned in said writ, and commanded to be levied as aforesaid. And the plaintiff further says, that after the said levy, and before the return of said writ, one Armstead B. Dawson made affidavit before a justice of the peace in and for said county, in pursuance of the statute in such case made and provided, that the said goods and chattels levied upon as aforesaid belonged to, and were the property of, said A. B. Dawson and Samuel Frion. And the said plaintiff further says, that at the return of the said writ the said Alexander, so being such sheriff as aforesaid, returned to the said county aforesaid on said writ that he had levied said writ on a stock of goods consisting of dry goods, hardware, carriages, &c., 1st February, A. D. 1840, as the property of J. M. Frion. And the said plaintiff in fact saith, that although it was the duty of said Alexander, as such sheriff as aforesaid, after the making of the said affidavit by said Dawson, in pursuance of the statute in such case made and provided, to prepare a bond, payable to the said J. W. & R. Leavitt, in a penalty double the amount of the said damages and costs, to be executed by said Dawson and Samuel Frion, or one of

them, or by some person for them, with security conditioned for the forthcoming of the said goods and chattels levied upon as aforesaid, if the same should be found liable to said writ of execution, and for the payment of such costs and damages as should be recovered for putting in the claim far delay; nevertheless, the said Alexander, so being such sheriff as aforesaid, not regarding his duty in that behalf, but contriving, and wrongfully and unjustly intending, to injure the said J. W. & R. Leavitt, and to deprive them of the benefit of said levy, and of the means of obtaining satisfaction of said damages and costs specified in said writ as aforesaid, did not nor would, nor did or would any other person whatsoever for said Alexander, or on account of any other person, prepare and take from, or take from the said Dawson and Samuel Frion, or any person for them or either of them, a bond with security as aforesaid, and payable to said J. W. & R. Leavitt, and conditioned as aforesaid. And the plaintiff further says, that after said oath was made, and before the return of said writ, and on divers other days between the time said oath was made and the return of said writ, the said Alexander, so negligently, carelessly, and incautiously behaved, conducted, and demeaned himself, in the execution of his said office of sheriff as aforesaid, and took so little and such bad care of said goods and chattels so by him seized and taken in execution under and by virtue of said writ as aforesaid, and the whole of said goods and chattels were, by and through the mere negligence, inattention, and want of care of the said Alexander, as such sheriff as aforesaid, afterwards, and before the return of said writ, purloined, rescued, and carried away out of his custody or possession, by some person to the said J. W. & R. Leavitt unknown. And the plaintiff further saith, that the said damages and costs have not, nor have any part thereof, as yet been paid to said J. W. & R. Leavitt, nor hath the said Jeremiah M. Frion, the said Alexander, the said Dawson, and the said Samuel Frion, nor any other person, hitherto answered to said J. W. & R. Leavitt the value of said goods and chattels so levied upon as aforesaid, or any part thereof; and by reason of the premises the said J. W. & R. Leavitt have been and are wholly deprived of said goods and chattels so levied upon as aforesaid, and of the benefit of said levy, and of the means of satisfying said damages and costs, which are still wholly unpaid as aforesaid.

12. And the plaintiff, for assigning a further breach of the said writing obligatory, according to the statute in such case made and provided, further saith, that the said Alexander, so being sheriff as aforesaid, afterwards, and before the return of said last mentioned writ, to wit, on the first day of February, in the year of our Lord one thousand eight hundred and forty, at, to wit, the county aforesaid, as such sheriff as aforesaid, seized and took in execution divers goods and chattels of the said Jeremiah M. Frion, of great value, to wit, of the value of the moneys mentioned in said writ, and commanded to be levied as aforesaid. And the plaintiff further says, that after the said levy, and before the return of said writ, one Armistead B. Dawson made affidavit

before a justice of the peace in and for said county, in pursuance of the statute in such case made and provided, that the said goods and chattels, levied upon as aforesaid, belonged to and were the property [of] said Dawson and one Samuel Frion, and that they were not the property of the said Jeremiah M. Frion. And the said plaintiff further says, that at the return of said writ the said Alexander, so being such sheriff as aforesaid, returned to the said court aforesaid on said writ that he had levied said writ "on a stock of goods consisting of dry goods, hardware, carriages, &c., 1 February, 1840, as the property of J. M. Fryon."

And the said plaintiff in fact saith, that although it was the duty of said Alexander, as such sheriff as aforesaid, after the making of the said affidavit by said Dawson, in pursuance of the statute in such case made and provided, to prepare a bond payable to the said J. W. & R. Leavitt, in a penalty double the amount of the said damages and costs, to be executed by said Dawson and Samuel Frion, or one of them, or by some person for them, with security, conditioned for the forthcoming of the said goods and chattels levied upon as aforesaid, if the same should be found liable to said writ of execution, and for the payment of such costs and damages as should be recovered for putting in the claim for delay; nevertheless the said Alexander, so being such sheriff as aforesaid, not regarding his duty in that behalf, but contriving, and wrongfully and unjustly intending, to injure the said J. W. & R. Leavitt, and to deprive them of the benefit of said levy, and of the means of obtaining satisfaction of said damages and costs specified in said writ as aforesaid, did not nor would, nor did nor would any other person whatsoever for said Smith, or on account of any other person, prepare and take from, or take from the said Dawson and Samuel Frion, or any person for them, or either of them, a bond with security as aforesaid, and payable to said J. W. & R. Leavitt, and conditioned as aforesaid.

And plaintiff further says, that after said oath was made by said Dawson as aforesaid, the said Alexander so negligently, carelessly, and incautiously behaved, conducted, and demeaned, in the execution of his said office of sheriff as aforesaid, and took so little and such bad care of said goods and chattels, so by him seized and taken in execution under, and by virtue of, said writ as aforesaid, that the whole of said goods and chattels were, by and through the mere negligence, inattention, and want of care of the said Alexander, as such sheriff as aforesaid, purloined, rescued, and carried away out of his custody or possession, by some person to the said J. W. & R. Leavitt unknown.

And the plaintiff further saith, said damages and costs have not, nor have any part thereof, as yet been paid to J. W. & R. Leavitt, nor hath the said Jeremiah M. Frion, the said Alexander, the said Dawson, the said Samuel Frion, nor any other person, hitherto answered to said J. W. & R. Leavitt the value of said goods and chattels so levied upon as aforesaid, or any part thereof; and by reason of the premises the said J. W. & R. Leavitt have been and are wholly deprived of said

goods and chattels so levied upon as aforesaid, and of the benefit of said levy, and of the means of satisfying said [debt] and costs.

13. And the plaintiff, for assigning a further breach of the said writing obligatory, according to the statute in such case made and provided, further saith, that the said Alexander, so being sheriff as aforesaid, and before the return of said last mentioned writ, to wit, on the first day of February, in the year of our Lord one thousand eight hundred and forty, at, to wit, the county aforesaid, as such sheriff as aforesaid, seized and took in execution divers goods and chattels of the said Jeremiah M. Frion, of great value, to wit, of the value of the moneys mentioned in said writ, and commanded to be levied as aforesaid.

And the plaintiff further says, that after the said levy, and before the return of said writ, one Armstead B. Dawson made affidavit before a justice of the peace, in and for said county of Coosa, in pursuance of the statute in such case made and provided, that the said goods and chattels, so seized and taken in execution as aforesaid, belonged to, and were the property of, said Dawson and one Samuel Frion, and that they were not the property of the said Jeremiah M. Frion.

And the said plaintiff further says, that, at the return of said writ, the said Alexander, so being such sheriff as aforesaid, returned to the said court aforesaid, on said writ, that he had levied said writ "on a stock of goods, consisting of dry goods, hardware, carriages, &c., 1st February, 1840, as the property of J. M. Frion."

And said plaintiff further saith, that after the return of said last mentioned writ, to wit, on the twelfth day of September, in the year of our Lord one thousand eight hundred and forty, the said Alexander, by leave of the said circuit court first had and obtained, altered or amended his said return on said writ, by adding thereto the following words and figures, to wit: "The above goods have been claimed by A. B. Dawson and Samuel Frion, assignees of J. M. Frion, defendant, in execution, and claim bond given to William J. Campbell, now sheriff, and my successor in office. September 12th, 1840. A. Smith, late sheriff."

And the said plaintiff in fact says, that the said A. B. Dawson and Samuel Frion did execute and deliver to the said sheriff a claim bond, as stated in said amended return.

And the said plaintiff in fact further says, that after the execution of said claim bond by the said A. B. Dawson and Samuel Frion, the said Alexander, so being sheriff as aforesaid, so negligently and carelessly conducted himself in and about the business of his said office of sheriff, and took so little and such bad care of said claim bond, that thereby the said claim bond was lost, purloined, or destroyed; and that by reason of the premises last above set forth, and through the mere negligence, inattention, and want of care of the said Alexander, so being such sheriff as aforesaid, said claim bond was not returned to the said circuit court with said writ of execution, at the return of said writ by the said Alexander, so being sheriff as aforesaid, according to the statute in such case made and provided, and that said bond has never since

been returned to the said circuit court by the said Alexander, or by the said William J. Campbell, or by any other person.

And the plaintiff further saith, that the said damages and costs have not, nor have any part thereof, as yet been paid to the said J. W. and R. Leavitt, nor has the said Jeremiah M. Frion, the said Alexander, the said Dawson, the said Samuel Frion, nor any other person, hitherto answered to said J. W. and R. Leavitt the value of said goods and chattels so levied upon as aforesaid, or any part thereof; and by reason of the premises the said J. W. and R. Leavitt have been and are wholly deprived of said goods and chattels so levied upon as aforesaid, and of the benefit of said levy, and of the means of satisfying said damages and costs.

14. And the said plaintiff, for assigning a further breach of the said writing obligatory, according to the statute in such case made and provided, further saith, that the said Alexander, so being sheriff as aforesaid, and before the return of the said last mentioned writ, to wit, on the first day of February, in the year of our Lord one thousand eight hundred and forty, at, to wit, the county aforesaid, seized and took in execution divers goods and chattels of the said Jeremiah M. Frion, of great value, to wit, of the value of the moneys mentioned in said writ, and commanded to be levied as aforesaid. And the plaintiff further says, that after the said levy, and before the return of said writ, one Armstead B. Dawson made his affidavit before a justice of the peace in and for said county of Coosa, in pursuance of the statute in such case made and provided, that the said goods and chattels, so seized and taken in execution as aforesaid, belonged to and were the property of said Dawson and one Samuel Frion, and that they were not the property of said Jeremiah M. Frion. And the said plaintiff further says, that at the return of the said writ the said Alexander returned to the said court aforesaid on said writ, that he had levied said writ on a stock of goods consisting of dry goods, hardware, carriages, &c., 1st Feb'y, 1840, as the property of J. M. Frion. And the said plaintiff further saith, that after the making of said affidavit by said Dawson, the said Alexander, in pursuance of the statute in such case made and provided, prepared and delivered to the said Dawson a claim bond, to be executed with sureties by the said Dawson, payable to said J. W. and R. Leavitt, in a penalty double the amount of the said damages and costs, and conditioned for the forthcoming of said goods and chattels so seized and taken in execution as aforesaid, if the same should be found liable to the said writ of execution, and for the payment of such costs and damages as should be recovered for putting in the claim for delay. And the said plaintiff further saith, the said bond was duly executed by the said Dawson with sureties, and after being so executed, according to the statute in such case made and provided, was delivered by the said Dawson to the said Alexander, so being such sheriff as aforesaid. And the plaintiff further saith, that after the execution and delivery of said bond to said Smith, the said Alexander, so being such sheriff as aforesaid, so negligently and carelessly conducted himself in and about his

said office of sheriff, and took so little and such bad care of said bond, that thereby the said bond was lost, purloined, or destroyed; and that by reason of the premises last above set forth, and through the mere negligence, inattention, and want of care of the said Alexander, so being such sheriff as aforesaid, said claim bond was not returned to the said circuit court with said writ of execution at the return of the said writ by the said Alexander, according to the statute in such case made and provided; and that said bond has never since been returned to the said circuit court by the said Alexander, nor by any other person. And the plaintiff further saith, that the said damages and costs have not, nor have any part thereof, as yet been paid to the said J. W. and R. Leavitt, nor has the said Jeremiah M. Frion, the said Alexander, the said Dawson, nor any other person, hitherto answered to said John W. and Rufus Leavitt the value of the said goods and chattels so levied upon as aforesaid, or any part thereof; and by reason of the premises the said J. W. and R. Leavitt have been and are wholly deprived of said goods and chattels so levied upon as aforesaid, and of the benefit of said levy, and of the means of satisfying said damages and costs.

By means whereof, and by force of the statute in such case made provided, an action hath accrued to the said plaintiff to demand and have of and from the said defendants the said sum of thirty thousand dollars above demanded. Yet the said defendants have not paid the said sum of money, or any part thereof, to the said plaintiff, but to pay the same have hitherto wholly neglected and refused, and still do neglect and refuse, to the damage of the plaintiff sixty thousand dollars, and therefore they sue.

PRYOR & WHATLEY,
Attorneys for plaintiff.

Spring term, 1849.

REUBEN CHAPMAN, governor, use of J. W. & R. Leavitt,
vs.
ALEXANDER SMITH and others. } 748.

This day came the parties, by their attorneys, and on motion of the defendants, it is ordered that this suit be continued.

Fall term, 1849.

REUBEN CHAPMAN, governor, &c., use of J. W. & R. Leavitt,
vs.
ALEXANDER SMITH and others. } 748.

This day came the parties, by their attorneys, and on motion this cause is continued by the defendants.

2421.

Spring term, 1850.

REUBEN CHAPMAN, governor, &c., use of J. W. & R. Leavitt, vs. ALEXANDER SMITH and others. } 748.

This day came the parties by their attorneys, and on motion leave is given to plaintiff to amend the pleadings, and cause continued by defendants.

District court of the United States, for the middle district of Alabama.

ALEXANDER SMITH, John G. Graham, Bolling Hall, and Malcomb Smith, ads. REUBEN CHAPMAN, governor, &c, who sues for the use of John W. and Rufus Leavitt, partners, &c., &c.

Demurrer to 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, *and* 14 *breaches.*

December term, 1848.

I. And the said defendants, by E. W. Peck, their attorney, come and defend the wrong and injury, when, &c., and wave oyer of the supposed writing obligatory, in the said declaration mentioned, and it is read to them; and they also crave oyer of the condition of the said supposed writing obligatory, and it is read to them, &c.; which being read and heard, the said defendants as to the fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, and fourteenth breaches of the condition of the said supposed writing obligatory by the said plaintiff in his said declaration in this behalf assigned, say they ought not to be charged with the said debt by virtue of the said supposed writing obligatory, by reason of the said several breaches, or any one, or either of them; because, they say, that the matters therein contained, as the same are above stated and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against them, the said defendants, and that they are not bound by the law of the land to answer the same, or any one, or either of them, and this they are ready to verify; wherefore for want of sufficient breaches in this behalf the said defendants pray judgment, and that the said plaintiff, as to the said breaches, or any one, or either of them, may be barred from having or maintaining his aforesaid action thereof against them, &c.

Pleas to the 1, 2, *and* 3 *breaches.*

II. And the said defendants, as to the first, second, and third breaches by the said plaintiff in his declaration in this behalf assigned, say onerare non, because they say that heretofore, to wit, at the April term of the circuit court of the State of Alabama, held in and for the county of

Coosa, in said State, in the year one thousand eight hundred and forty-three, the said John W. and Rufus Leavitt, the identical persons for whose use this suit in this behalf is brought, by their attorney in that behalf, according to the statute of said State in such cases made and provided, suggested to said circuit court then in session, that a certain writ of execution, commonly called a writ of fieri facias, was issued by the clerk of said circuit court on the seventeenth day of October, in the year one thousand eight hundred and thirty-nine, directed to any sheriff of the State of Alabama; by which said writ of execution said sheriff was commanded to cause to be made, of the goods and chattels, lands and tenements, of Jeremiah M. Frion, the sum of three thousand four hundred and seventy-two dollars damages, and also the further sum of seven dollars and twenty-five cents costs, which the said John W. and Rufus Leavitt there lately, on the twenty-eighth day of September, in the year one thousand eight hundred and thirty-nine, in the said circuit court of said county of Coosa, had recovered against the said Jeremiah M. Frion, and to have the said sums of money, together with the said writ, at the then next circuit court for said county, to be holden on the fourth Monday in March then next thereafter, to render to the said plaintiffs, the said John W. and Rufus Leavitt, for their damages and costs aforesaid. And the said plaintiffs, the said John W. and Rufus Leavitt, in said suggestion, further stated, that said writ of execution was delivered to said defendant, the said Alexander Smith, who then was, and from thence, and until after said writ came into his hands, sheriff of said county of Coosa, for the due execution thereof, according to the exigencies of said writ; and which said writ, on the first day of February, in the year one thousand eight hundred and forty, the said defendant, the said Alexander Smith, sheriff as aforesaid, returned to the clerk's office without having made the money specified in said execution, but had wholly failed to make the same.

And the said John W. and Rufus Leavitt further suggested to the said circuit court, that the money specified in said execution could have been made by the said defendant, the said Alexander Smith, sheriff as aforesaid, had he used due diligence; and thereupon the said John W. and Rufus Leavitt, by their said attorney, prayed the said circuit court that the facts in said suggestion set forth might be inquired of in the manner prescribed by law, and that judgment might be rendered in their favor against the said defendant, the said Alexander Smith, sheriff as aforesaid, and said defendants, John G. Graham, Bolling Hall, and Malcolm Smith, and also John H. Thomas and Addison C. Love, his securities for the faithful discharge of his duties, as sheriff, &c., as aforesaid, for the amount specified in said writ of execution, with ten per cent. damages, and interest and costs of suit, &c.

And said defendants further say, that thereupon an issue, in the said circuit court, was made up between the said John W. and Rufus Leavitt and the said defendant, the said Alexander Smith, in which the said John W. and Rufus Leavitt averred that the said defendant, the said Alexander Smith, as sheriff of Coosa county, could have made

the money on said execution by due diligence; and the said defendant, the said Alexander Smith, denied that he could have made the money on said execution, as alleged by the said John W. and Rufus Leavitt as aforesaid.

And said defendants further say, that afterwards, at a circuit court begun and held in and for said county of Coosa, on the third Monday after the fourth Monday in September, in the year one thousand eight hundred and forty-seven, such proceedings were had on the said issue, so made as aforesaid between the said parties, that a jury of good and lawful men thereupon came, who, being by the said court empannelled, sworn, and charged, well and truly to try the said issue, upon their oaths did say, that they found the said issue in favor of the said defendant, the said Alexander Smith, and thereupon it was by the said court considered and adjudged that the said defendant, the said Alexander Smith, go hence without day, and that he recover of the said John W. and Rufus Leavitt the costs in that behalf expended, whereof the said John W. and Rufus Leavitt were convicted, as by the record and proceedings thereof still remaining in the said court, more fully and at large appears; which said judgment still remains in full force and effect, not in any wise reversed or made void; and this said defendants are ready to verify by the said record.

And the said defendants further aver, that the said writ of execution, in the said first, second, and third breaches in this behalf mentioned, and the said writ of execution, upon which the said suggestion was made, and the proceedings thereupon had, as aforesaid, are one and the same, and not other or different, &c.

And said defendants also further aver, the *the* alleged neglects, defaults, and breaches of duty in the said first, second, and third breaches in this behalf assigned, and in the said suggestion, &c., are the same, and not other or different, &c., all which said defendants are ready to verify. Wherefore said defendants pray judgment, if the said plaintiff who sues for the use, &c., as aforesaid, by reason of any thing in the said first, second, and third breaches, &c., ought to have or maintain his aforesaid action thereof against them, &c.

Plea of statute of limitations by the securities to the first, second, and third breaches.

III. And the said defendants, the said John G. Graham, Bolling Hall, and Malcom Smith, for a further plea in this behalf, as the said first, second, and third breaches, by leave, &c., say onerare non, because they say, that the said several supposed causes of action, in the said declaration mentioned, as by the said first, second, and third breaches in that behalf assigned, did not, nor did either of them, accrue to the said plaintiff, for the use of the said John W. and Rufus Leavitt, at any time within six years next before the commencement of the action in this behalf, in manner and form as the said plaintiff hath above thereof in this behalf complained against them. And this said

defendants are ready to verify; wherefore they pray judgment, if the said plaintiff ought to have or maintain his aforesaid action thereof against them, &c.

E. W. PECK,
Attorney for defendants.

Joinder in demurrer.

R. CHAPMAN, governor, use Leavitt,
vs.
A. SMITH et al.

And the said plaintiff saith, that the said fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, and fourteenth breaches, in said declaration contained, and the matters therein contained, in manner and form as the same are above stated and set forth, are sufficient in law for the said plaintiff to have and maintain the said breaches thereof against the said defendants, and the said plaintiff is ready to verify and prove the same; wherefore, inasmuch as the said defendants have not answered the said fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, and fourteenth breaches, nor hitherto in any manner denied the same, the plaintiff prays judgment, and his debt to be adjudged to him, &c.

J. W. PRYOR,
Plaintiff's attorney.

Replication to first three pleas.

R. CHAPMAN, governor, use, &c.,
vs.
A. SMITH et al.

And the said plaintiff, as to the said pleas of said defendants by them above pleaded to the said three first breaches assigned in said declaration, saith, that the said plaintiff, by reason of any thing in that plea alleged, ought not to be barred from having and maintaining the aforesaid three breaches thereof against the said defendants, because he saith that the said matters, neglects, and defaults in said three breaches assigned in said declaration, were not the same identical matters, neglects, and defaults in the said plea mentioned, and for and in respect of which the said supposed judgment, in the said plea mentioned, was recovered in manner and form as the said defendant hath above in his said plea alleged; and this the said plaintiff prays may be inquired of by the country.

And the said plaintiff, as to the plea of said John G. Graham, Bolling Hall, and Malcom Smith, secondly above pleaded to the said three first breaches in said declaration assigned, and whereof they have put themselves on the country, doth the like.

And the said plaintiff saith, that the said fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, and fourteenth

breaches in the said declaration mentioned, and the matters therein contained, in manner and form as the same are above stated and set forth, are sufficient in law for him, the said plaintiff, to have and maintain the aforesaid breaches thereof against the said defendants, and the said plaintiff is ready to verify and prove the same as the court here shall direct and award. Wherefore, inasmuch as the said defendants have not answered the said three first breaches, nor hitherto in any manner denied the same, the said plaintiff prays judgment, and his debt and damages by reason of the said three first breaches in the said declaration mentioned, to be adjudged to him.

PRYOR & WHATLEY,
Plaintiff's attorneys.

Demurrer to replication.

A. SMITH et al.
ads.
REUBEN CHAPMAN, gov'r, use, &c.

And the said defendants say, that the replication of the said plaintiff to the plea of the said defendants to the three first breaches of the said plaintiff's declaration in that behalf assigned, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient for the said plaintiff to have or maintain his aforesaid action thereof against the said defendants, and that the said defendants are not bound by the law of the land to answer the same, and this said defendants are ready to verify. Wherefore, for want of a sufficient replication in this behalf, the said defendants pray judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against them, &c.

E. W. PECK.

Joinder in demurrer.

R. CHAPMAN, gov'r, use of Leavitts,
vs.
A. SMITH et al.

And the plaintiff saith, that the said replication to the said plea of the said defendants to the said first three breaches of said plaintiff's declaration, and the matters therein contained, in manner and form as the same are above stated and set forth, are sufficient in law for him, the said plaintiff, to have and maintain his aforesaid action thereof against the said defendants, and the said plaintiff is ready to verify and prove the same as the court here shall direct and award. Wherefore, inasmuch as the said defendants have not answered the said replication, nor hitherto in any manner denied the same, the said plaintiff prays judgment of his debt and damages, by reason of the defaults alleged in the said first three breaches in the said declaration mentioned, to be adjudged to him, &c.

PRYOR & WHATLEY,
Plaintiff's attorneys.

Replication to plea of statute of limitations to first, second, and third breaches.

R. CHAPMAN, gov'r, use Leavitt,
vs.
A. SMITH et al.

And the said plaintiff, as to the said plea of the said John G. Graham, Bolling Hall, and Malcom Smith, first above pleaded to the said first, second, and third breaches in said declaration contained, saith, that the said plaintiff, by reason of any thing by the said defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against the said John G. Bolling and Malcom, because, he saith, that the said several causes of action in the said three breaches mentioned, and each and every of them, did accrue to the said plaintiff within six years next before the commencement of this suit, in manner and form as the said plaintiff hath above complained against the said defendant, to wit, at the district aforesaid; and this the plaintiff prays may be inquired of by the country, &c.

J. W. PRYOR,
Plaintiff's att'y.

Judgment, fall term, 1850.—Fall term, 1850.

REUBEN CHAPMAN, gov'r, &c., use of J. W. and R. Leavitt,
vs.
ALEXANDER SMITH, John G. Graham, Bolling Hall, and Malcom Smith. } 748.

This day came the parties, by their attorneys, and the defendants' demurrer to the fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, and fourteenth breaches of the plaintiff's declaration coming on to be heard, and, after argument, it is considered by the court that the said demurrer be sustained as to the eighth and thirteenth breaches, and overruled as to the fourth, fifth, sixth, seventh, ninth, tenth, eleventh, twelfth, and fourteenth breaches, and that the defendants have leave to plead to the said last named breaches.

And then came on to be heard the demurrer of the defendants to the replication of the plaintiff to the plea of said defendants to the first, second, and third breaches; and, after argument, it is considered by the court that the said demurrer be sustained. And, on motion of the plaintiff, he has leave to amend the eighth and thirteenth breaches of his said declaration, to which the demurrer of the defendants was sustained; and that said cause be continued until the next term of this court.

Chapman vs. *Smith et als.*

Plea to 4, 5, 6, *and* 7 *breaches.*

District court. December term, 1849.

REUBEN CHAPMAN, governor, &c., use of J. W. and R. Leavitt,
vs.
ALEX. SMITH et al.

IV. And the said defendants, as to the fourth, fifth, sixth, and seventh breaches, by the said plaintiff in this behalf assigned, say, onerare non, because they say that heretofore, at the April term of the circuit court of the county of Coosa, in the State of Alabama, in the year 1843, the said J. W. and R. Leavitt, the persons for whose use this suit is brought, instituted their proceedings against the said defendant, the said Alexander Smith, as sheriff of the said county of Coosa, by suggestion under the statute of the said State of Alabama, in such cases made and provided, that the said defendant, the said Alexander Smith, could have made the money on the execution in the declaration in this behalf mentioned by due diligence; and the said defendants further say, that on the said suggestion so made as aforesaid, an issue was made up under the direction of the said court to try the truth of the same. And the said defendants further say, that afterwards, to wit, at the fall term of said circuit court, in the year 1847, the said issue came on to be tried in said court, and was then and there tried by a jury duly empannelled for that purpose. And the said defendants further say, that on said trial the truth of the amended return made by the said defendant, the said Alexander Smith, on the said execution, as sheriff, &c., as aforesaid, became and was a material question to be tried and determined by the said jury, and was then and there submitted to them for that purpose. And the said defendants further say, that the said jury, by their verdict in that behalf rendered, found and determined that the said amended return was a true return, and thereupon the said court rendered judgment in favor of the said defendant, the said Alexander Smith, and against the said J. W. and R. Leavitt. And the said defendants further say, that the said verdict and the said judgment still remain in full force, not set aside, reversed, or in any manner made void. And the said defendants further say, that the said amended return on the execution in the said several breaches in this behalf mentioned, and the said amended return on the execution submitted to, and found and determined by the said jury as aforesaid, are the same and not other and different, and this the said defendants are ready to verify; wherefore the said defendants pray judgment, &c., &c.

E. W. PECK,
Attorney for defendant.

Fifth plea; stat. of lim. by sureties.

District court, December term, 1848.

ALEXANDER SMITH et al. ads. } REUBEN CHAPMAN, governor, &c., for the use of Jno. W. and R. Leavitt.

And the said defendants, the said John G. Graham, Bolling Hall, and Malcom Smith, for themselves, as to the fourth, fifth, sixth, seventh, ninth, tenth, eleventh, twelfth, and fourteenth breaches by the said plaintiff in this behalf, in his declaration assigned, say onerare non, because they say that the said several supposed causes of action in the said declaration mentioned, as by the said breaches in this plea in this behalf assigned, did not, nor did either of them, accrue to the said plaintiff, for the use of the said Jno. W. and Rufus Leavitt, at any time within six years next before the commencement of the action in this behalf in manner and form as the said plaintiff hath above in his said declaration complained against them; and this said defendants are ready to verify; wherefore they pray judgment, if the said plaintiff, by reason of the said breaches in this plea named, ought to have or maintain his aforesaid action thereof against them, &c.

Sixth plea.

And for a further plea in this behalf, the said defendants, the said Alexander Smith, John G. Graham, Bolling Hall, and Malcom Smith, by leave, &c., as to the ninth, tenth, eleventh, twelfth, and fourteenth breaches by the said plaintiff in his said declaration in this behalf assigned, &c., say, onerare non, because they say, that after the levy of said execution, as in the said several breaches is alleged, and before the return thereof, the said goods and chattels so levied on as aforesaid were claimed by one A. B. Dawson, and one Samuel Frion as assignees of said J. M. Frion, the said defendant in said execution, according to the statute in this State in such cases made and provided, and an affidavit of said claim was made by said A. B. Dawson, as in said several breaches is stated.

And said defendants further say, that the said A. B. Dawson and said Samuel Frion thereupon gave a bond for the trial of the right of said property so levied on as aforesaid, which said execution, with the said levy and claim so made as aforesaid endorsed thereon, with the said affidavit and claim bond, were duly returned to the clerk of said circuit court of Coosa county, and by him filed in his office, and the claim suit so instituted between the said Jno. W. and Rufus Leavitt as plaintiffs in execution, and the said Dawson and Samuel Frion, as claimants, was duly entered upon the trial docket of said court, at the term thereof to which said execution was made returnable.

And the said defendants further say, that at the term of said court to which the said claim was returned, &c., as aforesaid, that is to say, the

March term of said court, in the year one thousand eight hundred and forty, came the plaintiffs in said claim suit, the said Jno. W. and Rufus Leavitt, and the said claimants, by their respective attorneys; and thereupon the said plaintiffs in said claim suit, moved the court to dismiss the said claim, so put in as aforesaid, for the insufficiency of the said claim bond in that behalf; which said motion being then and there heard by said court was overruled, and the said cause was then and there continued until the next term of said court.

And the said defendants further say, that at the next term of said court, that is to say, the fall term thereof, in the year last aforesaid, came the parties by their attorneys, and the said claim suit being called, the said plaintiffs, the said John W. and Rufus Leavitt, declined to make up an issue to try the right of the property so levied on, &c., as aforesaid, under the direction of the court, the said claimants being then and there ready to make up the said issue on their part, for that purpose, and the said plaintiffs then and there refused in any manner further to prosecute their said levy; and thereupon it was ordered by the said court, that the said goods levied upon, &c., as aforesaid, be restored by the sheriff to the said claimants.

And the said defendants further say, that afterwards, to wit; on the day and year last aforesaid, the said goods and chattels, so levied on and claimed, &c., as aforesaid, in obedience to the said order so made, &c., as aforesaid, the same being in full force, and in no wise reversed or set aside, were restored to the said claimants. All which the said defendants are ready to verify; wherefore they pray judgment if the said plaintiff, by reason of the said breaches in this plea named, or any one or either of them, ought to have or maintain his aforesaid action thereof against them.

VII. And for a further plea in this behalf the said defendants, the said Alexander, John G., and Malcom, by leave, &c., as to the said ninth, tenth, eleventh, and twelfth breaches by the said plaintiff in his said declaration in this behalf assigned, &c., say, onerare non, because they say, that after the said levy of the said execution, as in the said breaches is alleged, and before the said goods and chattels, so levied on as aforesaid were delivered to the said Dawson and Sam'l Frion, to wit, at the September term of the circuit court of the said county of Coosa, 1840, an order was made by the said court, directing and requiring the said goods and chattels so levied on, &c., as aforesaid, to be delivered to the said Dawson and Samuel Frion; and afterwards, to wit, on the day of September, in the year aforesaid, the said goods and chattels, in obedience to and by virtue of said order so made, &c., as aforesaid, the same being then in full force, and in no wise reversed or set aside, were delivered to the said Dawson and Samuel Frion, without this, that the said goods and chattels were delivered or restored to the said Dawson and Samuel Frion, or claimed, wasted, lost, or destroyed by the carelessness or negligence of the said defendant, the said Alexander, or otherwise howsoever, as the said plaintiff hath in this behalf alleged, all which the said defendants are ready to verify;

wherefore they pray judgment if the said plaintiff, by reason of the said breaches, or any one or either of them in this plea named, ought to have or maintain his aforesaid action thereof against them, &c.

VIII. And the said defendants, the said Alexander, John G., and Malcom, for a further plea in this behalf by leave, &c., as to the ninth, tenth, eleventh, and twelfth breaches by the said plaintiff in his said declaration in this behalf assigned, say, onerare non, because they say, that heretofore, to wit, at the April term of the circuit court of the State of Alabama, held in and for the county of Coosa, in said State, in the year one thousand eight hundred and forty-three, the said Jno. W. and Rufus Leavitt, the identical persons for whose use this suit in this behalf was brought by their attorney in that behalf, according to the statute of said State in such cases made and provided, suggested to the said circuit court then in session, that a certain writ of execution, commonly called a writ of fieri facias, was issued by the clerk of said circuit court on the seventeenth day of October, in the year one thousand eight hundred and thirty-nine, directed to any sheriff of the State of Alabama; by which said writ of execution said sheriff was commanded to cause to be made of the goods and chattels, lands and tenements, of *Samuel* M. Frion the sum of three thousand four hundred and seventy-two dollars damages, and also the further sum of seven dollars and twenty-five cents costs, which the said Jno. W. & Rufus Leavitt then lately, on the twenty-eighth day of September, in the [year] one thousand eight hundred and thirty-nine, in the said circuit court of said county of Coosa, had recovered against the said Jeremiah M. Frion, and to have the said sums of money, together with the said writ, at the then next circuit court for said county, to be holden on the fourth Monday in March then next thereafter, to render to the said plaintiff, the said John W. & Rufus Leavitt, for their damages and costs aforesaid.

And the said John W. and Rufus Leavitt, in said suggestion further stated, that said writ of execution was delivered to the said defendant, the said Alexander Smith, who then was, and from thence and until after the said writ came into his hands, sheriff of the said county of Coosa, for the due execution thereof, according to the exigencies of said writ, and which said writ, on the first day of February, in the year one thousand eight hundred and forty, the said defendant, the said Alexander Smith, sheriff as aforesaid, returned to the clerk's office without having made the money specified in said execution, but had wholly failed to make the same.

And the said Jno. W. and Rufus Leavitt further suggested to the said circuit court that the money specified in said execution could have been made by the said defendant, the said Alexander Smith, sheriff as aforesaid, had he used due diligence; and thereupon the said John W. and Rufus Leavitt, by their said attorney, prayed the said circuit court that the facts in said suggestion set forth might be inquired of in the manner prescribed by law, and that judgment might be rendered in their favor against the said defendant, the said Alexander Smith,

sheriff, &c., as aforesaid, and said defendants, John G. Graham, Bolling Hall, and Malcom Smith, and also John H. Thomas and Addison C. Love, his securities for the faithful discharge of his duties as sheriff, &c., as aforesaid, for the amount specified in said writ of execution, with ten per cent. damages, and interest and costs of suit, &c.

And said defendants further say, that thereupon an issue was made up between the said John W. and Rufus Leavitt and the said defendant, the said Alexander Smith, in which the said John W. and Rufus Leavitt averred that the said defendant, the said Alexander Smith, as sheriff, &c., as aforesaid, could have made the money on said execution by due diligence; and the said defendant, the said Alexander Smith, denied that he could have made the money on said execution, as alleged by the said John W. and Rufus Leavitt as aforesaid.

And the said defendants further say, that afterwards, at a circuit court begun and held in and for said county of Coosa, on the third Monday after the fourth Monday in September, in the year one thousand eight hundred and forty-seven, such proceedings were had on the said issue, so made as aforesaid between the said parties, that a jury of good and lawful men thereupon came, who being by the said court empannelled, sworn, and charged well and truly to try the said issue, upon their oaths did say, that they found the said issue in favor of the said defendant, the said Alexander Smith; and thereupon it was by the said court considered and adjudged that the said defendant, the said Alexander Smith, go hence without day, and that he recover of the said John W. and Rufus Leavitt the costs in that behalf expended, whereof the said John W. and Rufus Leavitt were convicted, as by the record and proceedings thereof, still remaining in the said court, more fully and at large appears; which said judgment still remains in full force and effect, not in anywise reversed or made void; and this said defendants are ready to verify by said record.

And said defendants further aver, that the said writ of execution in the said breaches in this plea named, and the said writ of execution upon which the said suggestion was made, and the proceedings thereupon had as aforesaid, are one and the same, and not other or different, &c.

And the said defendants further aver, that the alleged neglects, defaults, and breaches of duty in the said breaches in this behalf assigned, and in the said suggestion, &c., are the same, and not other or different, &c.; all which said defendants are ready to verify. Wherefore said defendants pray judgment if the said plaintiff, who sues for the use, &c., aforesaid, by reason of any thing in the said breaches, or any one or either of them, in this plea named, ought to have or maintain his aforesaid action thereof against them, &c.

IX. And said defendants, for a further plea in this behalf, as to all and each of the breaches severally by leave, &c., say, onerare non, because they say that the goods and chattels levied upon, as stated in said breaches, at the time of said levy, and at the time said execution came to the hands of the said defendant, the said Alexander Smith,

sheriff, &c., aforesaid, were not the property of the said Jeremiah M. Frion, the defendant in said execution, and were not liable to be taken for the payment or satisfaction of the same; and this said defendants are ready to verify. Wherefore said defendants pray judgment, if the said plaintiff, who sues for the use aforesaid, by reason of any thing in the breaches, or any one or either of them, ought to have or maintain his aforesaid action thereof against them, &c.

X. And for a further plea in this behalf said defendants, by leave, &c., as to all and each of the breaches, severally say, onerare non, because they say that the said defendant, the said Alexander Smith, sheriff, &c., as aforesaid, is not guilty of the said several wrongs, neglects, defaults, or omissions, of duty, or any one or either of them, in manner and form as the said plaintiff hath in this behalf in the said breaches, or any one or either of them, complained; and of this said defendants put themselves upon the country, &c.

E. W. PECK,
Attorney for defendants.

Replication to plea of statute of limitation.

R. CHAPMAN, gov'r, use Leavitt,
vs.
A. SMITH et al.

And the said plaintiff, as to the said plea of the said John G. Graham, Bolling Hall, and Malcom Smith, first above pleaded to the said fourth, fifth, sixth, seventh, ninth, tenth, eleventh, twelfth, and fourteenth breaches in said declaration contained, saith, the said plaintiff, by reason of any thing by the said defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against the said John G., Bolling, and Malcom, because he saith that the several causes of action in the said several breaches mentioned, and each of them, did accrue to the said plaintiff within six years next before the commencement of this action, in manner and form as the said plaintiff *have* above complained against the said defendant, to wit, at the district aforesaid; and this the plaintiff prays may be inquired of by the country, &c.

J. W. PRYOR,
Plaintiff's attorney.

Demurrer to 4, 6, 7, 8, 9, *and* 10 *pleas.*

R. CHAPMAN, gov'r, use of Leavitts,
vs.
A. SMITH et al.

And the said plaintiff, as to the said pleas of the said defendants by them fourthly, sixthly, seventhly, eighthly, ninthly, and tenthly above pleaded, saith, that the same, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude him, the said plaintiff, from having

or maintaining his aforesaid action thereof against them, the said defendants, and that the said plaintiff is not bound by the law of the land to answer the same; and this the said plaintiff is ready to verify. Wherefore, for want of a sufficient plea in this behalf, the said plaintiff prays judgment and his debt aforesaid, together with his damages by him sustained on occasion of the detention thereof, as alleged in the said breaches, to be adjudged to him, &c.

PRYOR & WHATLEY,
Plaintiff's attorneys.

Judgment. Spring term, 1851.—Spring term, 1851.

REUBEN CHAPMAN, gov'r, &c., use of J. W. and R. Leavitt,
vs.
ALEXANDER SMITH and others.

This day came the parties by their attorneys, and the plaintiff's demurrer to the fourth, sixth, seventh, eighth, ninth, and tenth pleas coming on to be heard; and after argument, &c., it is considered by the court that the said demurrer to the fourth, eighth, ninth, and tenth pleas be overruled; that the demurrer as to the seventh plea be sustained; and that the demurrer to the sixth plea, as a plea to the ninth, tenth, eleventh, and twelfth breaches, be sustained; and said demurrer to said sixth plea, as a plea to the fourteenth breach, be overruled. And it is further ordered by the court that the plaintiff have leave to reply to the said pleas to which the said demurrer is overruled; and the defendants have leave to amend the pleas to which the demurrer is sustained. And on application of the defendants this cause is continued until the next term of this court.

Amended seventh plea.

District court, May term, 1851.

REUBEN CHAPMAN, governor, &c., for the use of J. W. and R. Leavitt,
vs.
ALEXANDER SMITH et al.

Amended seventh plea, filed by leave of the court at this present term, to the 9, 10, 11, and 12 breaches in the plaintiff's declaration assigned.

And the said defendants, for a further plea in this behalf, by leave, &c., as to the said 9, 10, 11, and 12 breaches, &c., say, onerare non, because they say that after the levy of the said execution on the said goods, &c., as in the said breaches is alleged, and before the return day of said execution, the said goods, &c., were claimed by one A. B. Dawson and one Samuel Frion, according to the statute in such cases made and provided; and an affidavit of said claim was duly made by the said A. B. Dawson, as is in the said breaches alleged.

sheriff, &c., aforesaid, were not the property of the said Jeremiah M. Frion, the defendant in said execution, and were not liable to be taken for the payment or satisfaction of the same; and this said defendants are ready to verify. Wherefore said defendants pray judgment, if the said plaintiff, who sues for the use aforesaid, by reason of any thing in the breaches, or any one or either of them, ought to have or maintain his aforesaid action thereof against them, &c.

X. And for a further plea in this behalf said defendants, by leave, &c., as to all and each of the breaches, severally say, onerare non, because they say that the said defendant, the said Alexander Smith, sheriff, &c., as aforesaid, is not guilty of the said several wrongs, neglects, defaults, or omissions, of duty, or any one or either of them, in manner and form as the said plaintiff hath in this behalf in the said breaches, or any one or either of them, complained; and of this said defendants put themselves upon the country, &c.

E. W. PECK,
Attorney for defendants.

Replication to plea of statute of limitation.

R. CHAPMAN, gov'r, use Leavitt,
vs.
A. SMITH et al.

And the said plaintiff, as to the said plea of the said John G. Graham, Bolling Hall, and Malcom Smith, first above pleaded to the said fourth, fifth, sixth, seventh, ninth, tenth, eleventh, twelfth, and fourteenth breaches in said declaration contained, saith, the said plaintiff, by reason of any thing by the said defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against the said John G., Bolling, and Malcom, because he saith that the several causes of action in the said several breaches mentioned, and each of them, did accrue to the said plaintiff within six years next before the commencement of this action, in manner and form as the said plaintiff *have* above complained against the said defendant, to wit, at the district aforesaid; and this the plaintiff prays may be inquired of by the country, &c.

J. W. PRYOR,
Plaintiff's attorney.

Demurrer to 4, 6, 7, 8, 9, *and* 10 *pleas.*

R. CHAPMAN, gov'r, use of Leavitts,
vs.
A. SMITH et al.

And the said plaintiff, as to the said pleas of the said defendants by them fourthly, sixthly, seventhly, eighthly, ninthly, and tenthly above pleaded, saith, that the same, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude him, the said plaintiff, from having

or maintaining his aforesaid action thereof against them, the said defendants, and that the said plaintiff is not bound by the law of the land to answer the same; and this the said plaintiff is ready to verify. Wherefore, for want of a sufficient plea in this behalf, the said plaintiff prays judgment and his debt aforesaid, together with his damages by him sustained on occasion of the detention thereof, as alleged in the said breaches, to be adjudged to him, &c.

PRYOR & WHATLEY,
Plaintiff's attorneys.

Judgment. Spring term, 1851.—Spring term, 1851.

REUBEN CHAPMAN, gov'r, &c., use of J. W. and R. Leavitt,
vs.
ALEXANDER SMITH and others.

This day came the parties by their attorneys, and the plaintiff's demurrer to the fourth, sixth, seventh, eighth, ninth, and tenth pleas coming on to be heard; and after argument, &c., it is considered by the court that the said demurrer to the fourth, eighth, ninth, and tenth pleas be overruled; that the demurrer as to the seventh plea be sustained; and that the demurrer to the sixth plea, as a plea to the ninth, tenth, eleventh, and twelfth breaches, be sustained; and said demurrer to said sixth plea, as a plea to the fourteenth breach, be overruled. And it is further ordered by the court that the plaintiff have leave to reply to the said pleas to which the said demurrer is overruled; and the defendants have leave to amend the pleas to which the demurrer is sustained. And on application of the defendants this cause is continued until the next term of this court.

Amended seventh plea.

District court, May term, 1851.

REUBEN CHAPMAN, governor, &c., for the use of J. W. and R. Leavitt,
vs.
ALEXANDER SMITH et al.

Amended seventh plea, filed by leave of the court at this present term, to the 9, 10, 11, and 12 breaches in the plaintiff's declaration assigned.

And the said defendants, for a further plea in this behalf, by leave, &c., as to the said 9, 10, 11, and 12 breaches, &c., say, onerare non, because they say that after the levy of the said execution on the said goods, &c., as in the said breaches is alleged, and before the return day of said execution, the said goods, &c., were claimed by one A. B. Dawson and one Samuel Frion, according to the statute in such cases made and provided; and an affidavit of said claim was duly made by the said A. B. Dawson, as is in the said breaches alleged.

And the said defendants further say, that the said execution, with the said levy, and the interposition of said claim, were duly returned to the clerk of the circuit court of the county of Coosa, and by said clerk filed in his office, and the claim suit thus instituted between the Leavitts, as plaintiffs in execution, and the said Dawson and Samuel Frion, as claimants, was duly entered upon the trial docket of said court, at the term thereof to which the said execution was returnable. And the said defendants further say, that at said term the said parties to said claim suit came, by their respective attorneys, and the said suit was then and there by the said court continued until the next term thereof.

And said defendants further say, that at the next term of said court, that is to say, the fall term thereof, in the year 1840, came the parties by their attorneys, and the said claim suit being called, the said plaintiffs, the said Leavitts, declined and refused to make up an issue to try the right of the said goods, &c., so levied on, &c., as aforesaid, under the direction of the court, the said claimants being then and there on their part ready and willing to make up said issue for that purpose, and the said plaintiffs then and there refused in any manner further to prosecute their said levy; and thereupon it was ordered by the court that the said goods, &c., levied upon, &c., as aforesaid, be restored by the sheriff to the said claimants.

And the said defendants further say, that afterwards, to wit, on the day the said order was so made, &c., as aforesaid, the said goods, &c., so levied on and claimed, &c., as aforesaid, in obedience to the said order so made, &c., as aforesaid, were restored and delivered to the said claimants; and the said defendants aver, that the said order still remains in full force, and in no wise set aside or reversed; all which the said defendants are ready to verify. Wherefore they pray judgment, if the said plaintiff, by reason of the said breaches, or either of them, ought to have or maintain his aforesaid action thereof against them, &c.

E. W. PECK, *Attorney, &c.*

Filed 31st May, 1851.

MATT. GAYLE, *Clerk.*

Demurrer to amended 7th plea.

R. CHAPMAN, governor, use Leavitts,
vs.
A. SMITH et al.

May term, 1851.

And the said plaintiff, as to the said amended plea of the said defendants, by them severally above pleaded to the said 9, 10, 11, and 12 breaches of plaintiff's declaration, saith, that the same, and the matters therein contained, in manner and form as the same are above

pleaded and set forth, are not sufficient in law to bar or preclude the said plaintiff from having or maintaining his aforesaid 9, 10, 11, and 12 breaches against the said defendants, and that the said plaintiff is not bound to answer the same, and that the said plaintiff is ready to verify; wherefore, for want of a sufficient plea in this behalf, the said plaintiff prays judgment and his debt aforesaid, together with his damages by him sustained by reason of the said four breaches to be adjudged him.

PRYOR & WHATLEY,
Plaintiff's attorneys.

Replication to amended 7th plea.

R. CHAPMAN, governor, use Leavitts,
vs.
A. SMITH et al.

DISTRICT COURT,
Middle district of Alabama.

And the said plaintiff, as to the said amended seventh plea of said defendants to the said ninth, tenth, eleventh, and twelfth breaches assigned in plaintiff's declaration saith, that the said plaintiff, by reason of anything by the said defendants in that plea alleged, ought not to be barred from having and maintaining his aforesaid ninth, tenth, eleventh, and twelfth breaches thereof against the said defendant, because he saith, that after the return day of said writ of fieri facias, described in said ninth, tenth, eleventh, and twelfth breaches, and after the return of said writ, and during the term of the said circuit court to which said writ was returnable, to wit, on the twenty-third day of March, in the said year eighteen hundred and forty, it being the second day of the said term of said court, the said A. B. Dawson made affidavit that the dry goods, hardware, carriages, &c., levied upon by the said Alexander as aforesaid, were not the property of said Jeremiah M. Frion, were not liable to execution, but were the property of said Dawson and Samuel Frion.

The said plaintiff further avers, that on the said twenty-third day of March, the said A. B. Dawson and Samuel Frion, together with one John G. Graham, executed their bond under their respective hands and seals, whereby the said Dawson, Samuel, and John G. acknowledged themselves to be held and firmly bound unto the said John W. and Rufus in the sum of thirty-four hundred and seventy-nine $\frac{25}{100}$ dollars, which said bond was and is subject to a certain condition thereunder written, whereby, after reciting to the effect following, to wit, that the said writ of fieri facias described in said ninth, tenth, eleventh, and twelfth breaches had been on the said first day of February, in said year eighteen hundred and forty, levied on a stock of goods consisting of divers goods, hardware, carriages, &c., as the property of said

Jeremiah, which said property had been claimed on oath by the said Dawson and Samuel Frion, then if the said Dawson and Samuel should pay to the said John W. and Rufus all such damages as the jury on the trial of the right of property might assess against said Dawson and Samuel, in case it should appear said claim was made for delay, said obligation should be void; otherwise to remain in full force and effect.

And the said plaintiff further avers, that on the said twenty-third day of March, the said Dawson, Samuel, and John G. executed their certain other bond under their respective hands and seals, by which they acknowledged themselves to be held and firmly bound unto one William J. Campbell, in the like sum of thirty-four hundred and seventy-nine $\frac{25}{100}$ dollars, which said last mentioned bond was and is subject to a certain condition thereunder written, to wit, to the like condition as that last above mentioned.

The said plaintiff further avers, that before the said twenty-third day of March, the said Alexander Smith ceased to be the sheriff of the said county of Coosa, and that on said day and afterwards the said William J. Campbell was the sheriff of said county; that when the said Alexander ceased to act as sheriff, he parted with the possession of said goods, hardware, carriages, &c., to some person or persons unknown to the plaintiff, and that when said affidavit and bond were made the said William J. had possession of the said goods, hardware, carriages, &c., and retained the possession thereof for a long time afterwards, to wit, for about six months.

The plaintiff further avers, that at the said March term of the said circuit court of Coosa county, and after the said affidavit and bonds were made, the said John W. and Rufus moved the said court to dismiss the said claim so made by said Dawson and Samuel on the said twenty-third day of March as aforesaid, for insufficiency of said claim bonds, which motion was by court overruled.

And the plaintiff further avers, that at the fall term of said circuit court of Coosa county, in said year eighteen hundred and forty, a judgment in said claim case was rendered in the following words: "Come the parties by their attorneys, and the said plaintiffs decline to make up an issue to try the right of the property levied upon by them under the direction of the court, and on the same being tendered to them by the said claimants, or in any manner to prosecute their levy further. It is therefore considered by the court, that the said plaintiffs in execution be nonsuited, and that the goods levied upon be restored to said claimants by the sheriff, and that said claimants recover of said plaintiffs their costs, for which execution may issue."

Said plaintiff further avers, that the said motion made at the said March term of said court, was made, and the said judgment rendered by said court, at the fall term thereof, in the year eighteen hundred and forty, was rendered, in the said claim suit commenced by the said affidavit and said bonds on the said twenty-third day of March, in said year eighteen hundred and forty, and not in any claim suit com-

menced by said affidavit described in the said amended seventh plea of defendant, nor in any other or different claim suit.

And the plaintiff avers, that the said affidavit, described in said amended seventh plea, was never returned to the said circuit court, either before nor after the return of said writ of fieri facias, and that the plaintiff never knew or had any notice, until the year eighteen hundred and forty-seven, that said last mentioned affidavit had been made.

And the said plaintiff further avers, that the said goods, &c., levied upon as aforesaid, were delivered to the said Dawson and Samuel by the said William J. Campbell, in obedience to the said last mentioned judgment or order of said circuit court; without this, that they were delivered to them, by the said Alexander, in obedience to any other judgment or order of said court.

And the said plaintiff further avers, that the said John W. and Rufus prosecuted their writ of error to the supreme court of said State to reverse said last mentioned judgment, and that the said judgment was by said supreme court, at the January term thereof, for the year eighteen hundred and forty-two, reversed and remanded to said circuit court.

The said plaintiff further avers, that at the fall term of said circuit court, for the year eighteen hundred and forty-two, the said claim put in as aforesaid by said Dawson and Samuel, was by the consideration and judgment of said court dismissed, because of the insufficiency of the said last mentioned claim bonds, the said Dawson and Samuel declining and refusing to execute other claim bond or bonds as they were required to do by the said circuit court; and plaintiff avers, that the said last mentioned judgment remains in full force, not reversed, annulled, or set aside in any way. All which the said plaintiff is ready to verify; wherefore he prays judgment, and his debt and damages by him sustained, by reason of the facts set out in said ninth, tenth, eleventh, and twelfth breaches, to be adjudged to him.

PRYOR & WHATLEY,
For plaintiff.

Demurrer to rep. to amended 7th plea.

District court, December term, 1851, middle district of Alabama.

REUBEN CHAPMAN, gov., &c., for the use of J. W. & R. Leavitt,
vs.
ALEXANDER SMITH et al.

And the said defendants say, that the replication of the plaintiff to seventh amended plea of the said defendants, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendants, and that the said defendants are not bound by law to answer the same, and this said defendants are ready to verify; wherefore, by reason of the insufficiency of the said replication in this behalf, the said defendants pray

Jeremiah, which said property had been claimed on oath by the said Dawson and Samuel Frion, then if the said Dawson and Samuel should pay to the said John W. and Rufus all such damages as the jury on the trial of the right of property might assess against said Dawson and Samuel, in case it should appear said claim was made for delay, said obligation should be void; otherwise to remain in full force and effect.

And the said plaintiff further avers, that on the said twenty-third day of March, the said Dawson, Samuel, and John G. executed their certain other bond under their respective hands and seals, by which they acknowledged themselves to be held and firmly bound unto one William J. Campbell, in the like sum of thirty-four hundred and seventy-nine $\frac{25}{100}$ dollars, which said last mentioned bond was and is subject to a certain condition thereunder written, to wit, to the like condition as that last above mentioned.

The said plaintiff further avers, that before the said twenty-third day of March, the said Alexander Smith ceased to be the sheriff of the said county of Coosa, and that on said day and afterwards the said William J. Campbell was the sheriff of said county; that when the said Alexander ceased to act as sheriff, he parted with the possession of said goods, hardware, carriages, &c., to some person or persons unknown to the plaintiff, and that when said affidavit and bond were made the said William J. had possession of the said goods, hardware, carriages, &c., and retained the possession thereof for a long time afterwards, to wit, for about six months.

The plaintiff further avers, that at the said March term of the said circuit court of Coosa county, and after the said affidavit and bonds were made, the said John W. and Rufus moved the said court to dismiss the said claim so made by said Dawson and Samuel on the said twenty-third day of March as aforesaid, for insufficiency of said claim bonds, which motion was by court overruled.

And the plaintiff further avers, that at the fall term of said circuit court of Coosa county, in said year eighteen hundred and forty, a judgment in said claim case was rendered in the following words: "Come the parties by their attorneys, and the said plaintiffs decline to make up an issue to try the right of the property levied upon by them under the direction of the court, and on the same being tendered to them by the said claimants, or in any manner to prosecute their levy further. It is therefore considered by the court, that the said plaintiffs in execution be nonsuited, and that the goods levied upon be restored to said claimants by the sheriff, and that said claimants recover of said plaintiffs their costs, for which execution may issue."

Said plaintiff further avers, that the said motion made at the said March term of said court, was made, and the said judgment rendered by said court, at the fall term thereof, in the year eighteen hundred and forty, was rendered, in the said claim suit commenced by the said affidavit and said bonds on the said twenty-third day of March, in said year eighteen hundred and forty, and not in any claim suit com-

menced by said affidavit described in the said amended seventh plea of defendant, nor in any other or different claim suit.

And the plaintiff avers, that the said affidavit, described in said amended seventh plea, was never returned to the said circuit court, either before nor after the return of said writ of fieri facias, and that the plaintiff never knew or had any notice, until the year eighteen hundred and forty-seven, that said last mentioned affidavit had been made.

And the said plaintiff further avers, that the said goods, &c., levied upon as aforesaid, were delivered to the said Dawson and Samuel by the said William J. Campbell, in obedience to the said last mentioned judgment or order of said circuit court; without this, that they were delivered to them, by the said Alexander, in obedience to any other judgment or order of said court.

And the said plaintiff further avers, that the said John W. and Rufus prosecuted their writ of error to the supreme court of said State to reverse said last mentioned judgment, and that the said judgment was by said supreme court, at the January term thereof, for the year eighteen hundred and forty-two, reversed and remanded to said circuit court.

The said plaintiff further avers, that at the fall term of said circuit court, for the year eighteen hundred and forty-two, the said claim put in as aforesaid by said Dawson and Samuel, was by the consideration and judgment of said court dismissed, because of the insufficiency of the said last mentioned claim bonds, the said Dawson and Samuel declining and refusing to execute other claim bond or bonds as they were required to do by the said circuit court; and plaintiff avers, that the said last mentioned judgment remains in full force, not reversed, annulled, or set aside in any way. All which the said plaintiff is ready to verify; wherefore he prays judgment, and his debt and damages by him sustained, by reason of the facts set out in said ninth, tenth, eleventh, and twelfth breaches, to be adjudged to him.

PRYOR & WHATLEY,
For plaintiff.

Demurrer to rep. to amended 7th plea.

District court, December term, 1851, middle district of Alabama.

REUBEN CHAPMAN, gov., &c., for the use of J. W. & R. Leavitt,
vs.
ALEXANDER SMITH et al.

And the said defendants say, that the replication of the plaintiff to seventh amended plea of the said defendants, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendants, and that the said defendants are not bound by law to answer the same, and this said defendants are ready to verify; wherefore, by reason of the insufficiency of the said replication in this behalf, the said defendants pray